[APPELLATE CIVIL JURISDICTION]

THOMAS, C.J., BURTON & HOWES, JJ.
March 29, 1934

JOHN CHARLES BAUMANN.....Appellant.

v.

THE RECEIVER AND MANAGER OF PERAK TIN, LIMITED.....Respondent.

[PERAK CIVIL APPEAL No. 18 of 1933.]

Cancellation of sub-lease for breach of condition regarding payment of tribute—The Mining Enactment, 1911, section 92 and Form (iv) in Schedule J—The Mining Enactment, 1928, sections 2 (ii) and 97 (ii) (a)—Discretion of Warden to relieve against cancellation of sub-lease—Effect of the provisions of The Interpretation and General Clauses Enactment, 1932, on the rights of the parties to a sub-lease made under the Mining Enactment, 1911, when the breach takes place after the enacting of the Mining Enactment, 1928.

In 1924, the appellant, who held certain mining land as sub-lessee, granted a further sub-lease to the Perak Tin Limited, a Company of which the respondent was appointed Receiver and Manager in 1931.

Both the sub-lease granted to the appellant and the sub-lease granted by him to the respondent contained clauses providing for the payment of tribute at rates varying inversely with the number of labourers employed or the equivalent horse power applied in working the mine, with the usual penalty clauses. In each case a further clause provided for cancellation by the Warden or the Court upon proof, *inter alia*, of failure to pay tribute for a period of one month from the date on which payment became due.

In 1930, the Company granted a further sub-lease of this land to Lai Weng Huin.

In November, 1932, Lai Weng Huin, without the knowledge of the respondent, made a reduction in the horse power applied to the working of the mine and accordingly tribute became payable by the respondent at the rate of 6% instead of 8%.

On the 17th January, 1933, again without the knowledge of the respondent, the engine then in use was removed from the mine and tribute became payable at the higher rate of 8%.

On the 15th June, 1933, the appellant learned of the removal of the engine in January, 1933, and wrote to the respondent demanding a sum of $117.40, enhanced tribute.

On the 17th June, 1933, the respondent forwarded a cheque for this amount to the appellant, but the latter refused to accept the cheque and, after further correspondence, took proceedings before the Warden of Mines, Perak, for the cancellation of the sub-lease granted by him to the respondent.

The Warden ordered cancellation but on appeal to the Court of a Judge this order was set aside.

Held, that although by virtue of the provisions of section 97 (ii) of the Mining Enactment, 1928, the legislature has invested the Warden with a discretion on an application for cancellation of a sub-lease, yet by virtue of the authority in the case of *Yap Foong* v. *Salak South Ltd.* *Innes* on Land Registration 145, which has stood unchallenged for 22 years the words, "liable to cancellation" in clause 8 of Form (iv) in Schedule J to the Mining Enactment, 1911, must now be held to mean liable at the option of the sub-lessor and the Warden must order cancellation of the sub-lease upon proof that a breach of the sub-lease had been committed.

Held further, that the sub-lease was entered into under the provisions of the Mining Enactment, 1911, and consequently the appellant, as sub-lessor, had a contractual right to cancellation of the sub-lease which was preserved by section 15 (ii) of the Interpretation and General Clauses Enactment, 1932, and by section 2 (ii) of the Mining Enactment, 1928.

Decision of Mudie, J., reversed and the order of the Warden of Mines reinstated by the Court of Appeal (Thomas, C.J., and Burton, J., Howes, J., dissenting).

The Hon'ble Mr. E. D. Shearn for the appellant.

There was a breach of condition which empowered the Warden to cancel the sub-lease. The sub-lease was made in a form appropriate to the Mining Enactment, 1911. It contained a contract providing for cancellation at the request of the sub-lessor on proof of a breach. *Yap Foong* v. *Salak South Ltd.*, *Innes* on Land Registration 145 applies. The Warden had jurisdiction to cancel under section 97 (ii) (a) of the Mining Enactment, 1928. In exercising it he must have regard to the contractual rights of the parties.

The sub-lessor's contractual right to cancellation is preserved by the Interpretation and General Clauses Enactment, 1932, section 15 (ii) and by the earlier Enactment No. 10 of 1924, also by the Mining Enactment, 1928, section 2 (ii). Sub-lessor is himself liable to penalties at the hands of his lessors under the terms of his lease for breach of condition.

English authorities are not applicable here to leases under the Land Code, 1926, or the Mining Enactment. Right to forfeiture is statutory and no statutory relief is provided. In any event in England relief is only given if payment is made of arrears and the lessor's position is not prejudiced by the breach. In this case the lessor is liable to statutory penalties by reason of the breaches.

J. M. M. Lewis for the respondent. Failure to pay tribute at the rate prescribed is admitted, but the respondent was ignorant of change in methods of working employed by his sub-lessees and unaware that tribute had become due at an enhanced rate, until he received in June notification to that effect from the appellant. The appellant called for the additional tribute from January, 17th. For this the respondent sent a cheque promptly. The appellant also called upon the respondent to adjust without delay any further sums should they be due on account of tribute.

Clause providing for cancellation on default continuing for one month is invalid whether the matter falls under the 1911 or the 1928 Mining Enactment.

Period fixed by law is 6 months. No power to cancel was conferred by the 1911 Enactment on the Warden.

Warden acted under section 97 (ii) of the Mining Enactment, 1928 and possesses a discretion.

Yap Foong v. *Salak South Ltd., (supra)*, does not apply.

In exercising discretion the Warden should have regard to English equitable principles. *Lai Yew Seng* v. *Wong Chin Gook*, 2 F.M.S.L.R. 112.

Equity gives relief against forfeiture for non-payment of rent whenever breach can be cured by payment. *Bowser* v. *Colby*, 66 E.R. 969, *Howard* v. *Fanshawe*, (1895) 2 Ch. 581. and others—English and Indian Cases.

THOMAS, C. J.—The appellant John Charles Baumann, is the holder of a registered sub-lease No. 129/22 of certain mining leases. The lessor to him was a company known as Papan Tin Limited. This company held only a lease of the same mining leases.

The appellant in turn sub-leased the same mining properties to a company called Perak Tin Limited. And Perak Tin Limited also sub-leased the same mining properties to a person who has been referred to as the tributor.

All these sub-leases were held practically on identical terms as the sub-lease from appellant to respondent, which included amongst others the following:—

1. That the sub-lessee shall pay to the sub-lessor, or to the duly appointed agent, tribute upon all ore removed from the said land at the rate of eight per cent of all tin ore won when less than 500 coolies or their equivalent in horse power are employed, provided that the tribute shall be reduced to six per cent on all ore won when 500 coolies or over or their equivalent horse power are at work on the land—such tribute shall be paid to the Straits Trading Company Limited whose receipt for the same shall be a complete discharge to the said sub-lessee. For the purposes of this sub-lease one horse power shall be considered the equivalent of eight coolies.
2. That the said tribute shall be paid immediately after each sale of ore of and at which sales the sub-lessor shall have full notice and the right to be present.
3. That the sub-lessee shall be liable upon suit before the Warden or any Court to pay to the sub-lessor the sum of dollars one hundred as a penalty for each and every breach of the conditions above set out which he may commit.
4. That this sub-lease shall be liable to cancellation at any time by the Warden or the Court upon proof:—
   (i) That the sub-sub-lessees have failed to pay the sub-sub-lessor the amount of any moneys which they are by the terms of this sub-lease bound to pay for a period of one month from the date at which such payment became due.

In June, 1933 Papan Tin Limited received information that an engine had been removed from the mine, and that consequently tribute should have been paid at the rate of eight per cent instead of six per cent. A letter was sent to the appellant asking for a cheque for dollars one hundred and seventeen and cents forty the difference in the tribute due, and for the future payment of tribute at the higher rate. A copy of this letter was forwarded by the appellant to the respondent Company, dated the 15th June, 1933. In that letter the following paragraphs appear:—

> "If the allegations contained in that letter are correct, they constitute a breach of clause 1 of your sub-sub-lease Agreement dated 14th day of May, 1924, which renders the same liable to cancellation.
> If you agree with the statement of account of the Secretaries of Papan Tin Limited please send me a cheque by return for the amount claimed by them, $117.40.
> Should there be further sums due on account of tribute under the terms of the sub-sub-lease agreement, will you please adjust the matter without delay."

In reply the respondent forwarded a cheque for $117.40 in a letter dated June 17th, 1933.

On the 29th of June, 1933 the appellant returned the cheque, and stated his intention to commence proceedings in the Warden's Court for the cancellation of the sub-sub-lease to Perak Tin Limited. The respondent replied on the 30th June, 1933 that the failure to pay at the higher rate was entirely due to an oversight. Subsequently the respondent forwarded a further cheque for $30.10. It would seem that this sum also was returned.

Subsequently proceedings were instituted in the Warden's Court. At that hearing it was admitted by the respondent that tribute at a higher rate than six per cent had not been tendered prior to the 17th of June, 1933. It was however objected that the appellant had waived his right to insist on tribute being paid. The Warden found that there had been a breach of clause 1, and that the sub-lease was liable to cancellation under clause 8 (i) of the lease, and section 97 (ii) (a) of the Mining Enactment No.

19 of 1928. The sub-lease was accordingly cancelled. From that decision of the Warden the respondent appealed to Mudie, J.

The learned Judge was of opinion that a discretion was conferred on the Warden by section 97 (ii) of the 1928 Enactment, and that that discretion must be exercised judicially that is to say, having regard to the principles of law and equity. The learned Judge went on to say that:—

> "As the appellant had tendered the arrears of tribute in full, the Warden ought to have exercised his discretion in his favour, on condition that he paid the costs of the application."

He, therefore, allowed the appeal, and the decision of the Warden was reversed. The learned Judge made an order that the plaintiff's (present appellant's) application should be dismissed.

From that decision the appellant appeals.

At the time the sub-leases were granted the Mining Enactment No. 12 of 1911 was in force. This Enactment was repealed by Enactment No. 19 of 1928. Section 29 of the 1911 Enactment provided that:—

> "Any person wishing to...sub-lease...his land shall deliver or transmit to the Collector of the District wherein the land to be....sub-leased....is situated the document of title under which the land is held together with a memorandum, substantially in such one of the forms in Schedule J, as the nature of the case may require, and with such variation, if necessary, as the Collector may permit, filled in and duly signed by each of the parties thereto..."

The sub-lease granted by the appellant to the respondent Company followed the Form J. (IV), and contained the clause 8 which provided that the sub-lease should be liable to cancellation at any time by the Warden or the Court upon proof etc.

The principal variation was that in clause 8 (i) a period of one month was substituted for the period six months.

By section 90:—

> "Every officer duly appointed to exercise the powers of Warden shall be vested by virtue of such appointment with the powers of a Magistrate of the First Class for the purpose of compelling the attendance of witnesses, of maintaining order in Court, and otherwise of carrying into effect the provisions of this Enactment."

Section 92 provides:—

> "A Warden of Mines may enquire into and decide all disputes between occupiers of Mining Lands.....concerning any of the matters hereinafter mentioned, and shall have power to make any order which may be necessary for the purpose of giving effect to his decision.....
> Such matters are as follows:—
> (c) concerning any wrongful act committed or any act wrongly committed, or alleged to have been committed or omitted, in the course of mining operations by any person against any other person;
> (d) concerning acts, omissions, or matter in the course of, connected with, or auxiliary to mining operations, requiring explanations which may have come to his knowledge."

That language is extremely wide, and in view of the provisions in section 29 and Schedule J., it would seem that it was intended that an application for the cancellation of a sub-lease could be made to the Warden, and that he could enquire into and decide the dispute under the 1911 Enactment.

That was the course adopted in the case of *Yap Foong* v. *Salak South Limited, Innes* on Land Registration 145. No objection was therein taken to the jurisdiction of the Warden. In that case, however, it was held that the power to apply for cancellation could be made solely at the option of the lessor, and that on proof of the matters complained of and that a breach of the conditions had been made, the Warden must order the lease to be cancelled.

That decision was arrived at by a Full Court of two Judges, which then constituted the Court of Appeal in the Federated Malay States. Its correctness might well be called in question, but in view of its having remained in force for a considerable time and of its being known and presumably acted upon by the mining interests, it might be difficult as well as undesirable to reverse it, since it is of the utmost importance that as far as possible the law should be settled and not in a constant state of flux.

In 1928 a new mining Enactment No. 19 of 1928 was passed.

Section 36 provides:—

> "If any lessee wishes to sub-lease his land, such lessee and the intended sub-lessee shall execute and present together with the mining lease a memorandum of sub-lease in the form in Schedule X with such variation of the form but not of the substance as the Collector may permit, and thereupon ....."

The form in Schedule X provides in clause 8 that:—

> "This sub-lease shall be liable to cancellation at any time at the discretion of the Warden or the Court upon proof" etc.

By this amendment of the Schedule the cancellation of a lease no longer remains at the discretion of the lessee, but the Warden is given a discretion to cancel.

Section 97 provides that:—

> "A Warden may enquire into and decide all disputes between occupiers of mining lands, either amongst themselves or in relation to themselves and third parties, concerning any of the matters hereinafter mentioned, and shall have power to make any order which may be necessary for the purpose of giving effect to his decision and....."

Then there are set out two sub-sections (c) and (d) which have already been set out in connection with section 90 above. Following these two sub-sections is a further sub-section as follows:—

> "(ii) The Warden shall have power in his discretion to cancel a sub-lease upon proof to his satisfaction that:—
>
> (a) the sub-lessee has failed for a period of six months from the date at which payment became due to pay to the sub-lessor the amount of any moneys which he is by the terms of his sub-lease bound to pay."

It has been argued that the terms of the 1928 and not of the 1911 Enactment apply since the breach was subsequent to the passing of the 1928 Enactment.

By sub-section 2 (ii) of the 1928 Enactment it was provided that:—

> "Nothing in this Enactment shall invalidate any title to occupy land for mining purposes lawfully given under any repealed Enactment or in the absence of any express provision in that behalf abrogate any of the rights or privileges expressly conferred thereby; provided that every such title, right or privilege shall be limited to the extent prescribed by the Enactment under or by virtue of which the same was granted or conferred; and provided further that, save as by such title or Enactment is expressly otherwise provided. it shall be incumbent upon a lessee or occupier of the said land to hold and mine the same in accordance with the covenants and conditions set forth in the Enactment and in all respects as if his title to occupy the same were a lease issued under this Enactment."

The sub-lease followed the form in Schedule J, and provided that it should be liable to cancellation at any time by the Warden or the Court. It does not expressly say that such cancellation shall be at the option of the lessor; it does not say that the Warden shall have a discretion. On these matters the sub-lease and the Enactment are silent. The words in the schedule have, it is true, been the subject of judicial interpretation.

In the case of *Thames Conservators* v. *Smeed Dean & Co.*, (1897) 2 Q.B. 334, A. L. Smith, L.J. said in the course of his judgment:—

> "As to the point taken on behalf of Mr. Booth, that his rights were saved by section 238 of the Act of 1894, it will be seen that this section commences with the words 'except as in this Act expressly provided,' and, if my construction of section 87 be correct, it has been expressly provided that no one other than the Conservators and their licensees may dredge and raise gravel from the bed of the river, and section 238 therefore does not avail him."

The words there under consideration were the words, 'bed of the river,' and they were held to apply to certain lands in respect of which the defendant held a licence from the proprietor of the soil.

The words 'liable to cancellation' having been construed as meaning liable to cancellation at the option of the lessor would therefore seem to have been expressly within the meaning of sub-section 2 (ii) of the 1928 Enactment.

By the General Clauses Enactment in force in 1928, section 3 (iii) provides:—

> "Whenever any written law repeals either in whole or part a former written law, such repeal shall not in the absence of any express provision to the contrary affect or be deemed to have affected:—
>
> (b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law."

This Enactment was repealed by Enactment No. 27 of 1932, which provides by section 15:—

> "Whenever any written law repeals wholly or in part a former written law, such repeal shall not, in the absence of any express provision to the contrary affect or be deemed to have affected:
>
> (ii) any right, liberty, privilege, obligation or liability acquired, imposed or incurred under the repealed written law."

In view of these provisions I am satisfied that the decision of the Warden was right. The positive language of the Enactment excludes the exercise by the Courts of any equitable jurisdiction in respect of the matters under consideration.

In the grounds of appeal before Mudie, J. there was one raising the question of waiver founded upon the letter. For some reasons

which I do not fully appreciate, this ground of appeal was abandoned before Mudie, J. No reference was made to it in argument before the Court of Appeal. I will, therefore, content myself with referring to the case of *Ward* v. *Day*, (1863) 4 B. & S. 337, without further comment.

This appeal must, therefore, be allowed. The order of the Warden will be reinstated, the appellant to have the costs of this appeal and of the appeal before Mudie, J.

BURTON, J.—On 7th November, 1922, Papan Tin Limited sub-leased some mining land to John Charles Baumann; and on 14th May, 1924, Baumann sub-sub-leased the land to Perak Tin Limited, the respondent in this case. Perak Tin Limited committed a breach of one of the covenants of the sub-sub-lease by a late payment of a small part of the tribute due. Baumann applied to the Warden for cancellation of his sub-sub-lease, and the Warden made the order. Perak Tin Limited appealed and Mudie, J. reversed the order of the Warden. The appellant now appeals from the order of Mudie, J.

The question in this case is whether the Warden of Mines was right in cancelling the sub-sub-lease which Perak Tin Limited held from Baumann. This sub-sub-lease was in the statutory form sanctioned by the Mining Enactment, 1911, with certain permitted variations, clause 8 of which was:—

> "That this sub-lease shall be liable to cancellation at any time by the Warden or the Court upon proof:
>
> (i) That the sub-sub-lessees have failed to pay to the sub-sub-lessor the amount of any moneys which they are by the terms of this sub-lease bound to pay for a period of one month from the date at which such payment became due."

It is admitted that default was made under this clause though the amount was small.

The first question that arose was whether under the 1911 Enactment the Warden had a discretion. The case of *Yap Foong* v. *Salak South Limited, Innes* on Land Registration 145, decided that the words "liable to cancellation" meant liable at the option of the sub-lessor, who, upon proving to the Warden that a breach had been committed by the sub-lessees, had a right to have the sub-lease immediately cancelled. This case was decided under the 1904 Enactment, but the wording is the same as in the 1911 Enactment. The report is meagre and the judgments are not given in full, but it is a decision of the Court of Appeal, and it is too late to question it. It has stood for twenty three years and innumerable sub-leases (including the present) have been made on the assumption that it is good law: see the judgment of Thesiger, L. J. in *Pugh* v. *Golden Valley Railway Co.*, (1880) 15 Ch. D. 330, at page 334 referring to the case of *R.* v. *Wycombe Railway Co.*, (1867) L.R. 2 Q.B. 310:—

> "Viewed simply as the decision of a Court of first instance, the authority of this case (*Reg.* v. *Wycombe Railway Co.*), notwithstanding the respect due to the Judges who decided it, is not binding upon us; but viewed in its character and practical results, it is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the Court from which they proceed. It constitutes an authority which, after it has stood for so long a period unchallenged, should not, in the interests of public convenience, and having regard to the protection of private rights, be overruled by this Court except upon very special considerations. For twelve years and upwards the case has continued unshaken by any judicial decision or criticism as an authoritative exposition of the meaning of section 16 of the Railways Clauses Consolidation Act, 1845, in respect of the matter here in dispute."

It must be held as established therefore that under the 1911 Enactment the Warden had no discretion to refuse cancellation if default was proved.

But in 1928 the Mining Enactment, 1911 was repealed and the Mining Enactment 1928 took its place. In this Enactment appears for the first time section 97 (ii) which is as follows:—

> "The Warden shall have power in his discretion to cancel a sub-lease upon proof to his satisfaction that—
>
> (a) The sub-lessee has failed for a period of six months from the date at which payment became due to pay to the sub-lessor the amount of any moneys which he is by the terms of his sub-lease bound to pay",

and paragraph 8 of the statutory form of sub-lease is altered accordingly. The legislature here invests the Warden with a discretion on an application for cancellation: and it was argued that the Warden ought to have acted under this Enactment and exercised a discretion in favour of the sub-sub-lessee. Which Enactment applies to the present case depends, I think, on the interpretation of section 3 (d) (ii) of the General Clauses Enactments 1896 and 1897 as amended by Enactment No. 10 of 1924. This was the law actually in force at the time of the passing of the Mining Enactment, but it does not differ in any way from section 15 (ii) of the Interpretation and General Clauses Enactment of 1932. The effect of this was to save:

"Any right, liberty, privilege, obligation or liability acquired, imposed or incurred under the repealed written law."

It was contended that these words can only apply to rights actually in being at the time of repeal, and not to rights conditional on the happening of a default which may never take place. I think, however, that the right, if properly considered, is a right in being. If we assume, as I think we must, that *Yap Foong* v. *Salak South Ltd.* (*supra*) is good law, the sub-sub-lessee had an obligation to pay his tribute punctually and the appellant a right to have it paid punctually and time was of the essence of the contract, for delay gave an absolute right to cancellation. But the 1928 Enactment would mitigate the obligation and detract from the right, and by allowing a discretion to the Warden would cause the time to be no longer of the essence of the contract. I think that the appellant had acquired a right to have his tribute paid punctually. I have arrived at this conclusion without much help from the cases cited. In *Hamilton Gell* v. *White*, (1922) 2 K.B. 422, cited by the respondent Atkin, L.J. says at page 431—

"It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative."

an argument drawn from the special circumstances of the Agricultural Holdings Acts and not, I think, helpful to us in our interpretation of the Mining Enactments. The other case he cited *Abbott* v. *The Minister for Lands*, (1895) A.C. 425, deals with the words "right accrued." But *Re Raison*, 63 L.T. 709, cited by the appellant, is of more assistance. It was decided in that case that a debtor adjudicated under the 1883 Act must apply for his discharge under section 28 of that Act and not under the Bankruptcy Act of 1890. Cave, J. at page 710 said:—

"It seems to me, therefore, that looking at the words which are used, e.g. "right, privilege, obligation, or liability," there was a right coupled with liabilities of a certain description, which right has been decidedly affected, because it is a right to some extent of a similar kind, except that it is subject to liabilities of a far more onerous description than it was before the passing of the Act of 1890."

I think the same considerations apply to section 2 (ii) of the Mining Enactment. There is no express provision to abrogate the right to immediate cancellation conferred by the 1911 Enactment, as interpreted by *Yap Foong* v. *Salak South*, (*supra*).

I conclude therefore that the appellant's absolute right to cancellation upon default by his sub-sub-lessee was preserved and that the provisions of section 97 (ii) of the 1928 Enactment do not apply on this ground.

The respondent then urges that the Warden had no power to cancel under the 1911 Enactment, and that the 1928 Enactment therefore applies because there is no other provision. In *Chang Fatt* v. *Mohamed Hussain*, 2 F.M.S.L.R.. 65, at page 66 Woodward. J.C. doubted whether the Warden had jurisdiction to cancel a sub-lease. He says:—

"I understand from the Warden's judgment that he cancelled the sub-lease for breach of this obligation. It has been argued that he had no jurisdiction to cancel it.

I take it that the usual form of sub-lease which comes before the Warden, on application for cancellation, is the form (No. IV) in Schedule J of the Enactment. In this form there is a stipulation that the sub-lease shall be liable to cancellation by the Warden upon proof that the sub-lessee has failed to fulfil certain obligations, or has assigned the sub-lease without written authority.

By virtue of this clause the Warden entertains applications for cancellation of sub-leases. But the Enactment does not expressly provide that the Warden shall have power to cancel them. Possibly such power can be inferred by reading several sections together: though I am very doubtful about it."

There is admittedly no provision in the 1911 Enactment corresponding to section 97 (ii) (a) of the 1928 Enactment, and that part of the 1911 Enactment which confers powers on the Warden does not give him express power to cancel a sub-lease. What power he has to cancel a sub-lease must arise under the statutory terms of the sub-lease or not at all. It is impossible of course to give the Warden by consent a jurisdiction that he does not possess. (*British Wagon Co.*, v. *Gray*, (1896) 1 Q.B. 35.)

Section 29 (i) provides that:—

"Any person wishing to.....sub-lease..... his land, shall deliver.....to the Collector .....the document of title under which the land is held together with a memorandum substantially in such one of the forms in Schedule J as the nature of the case may require, and with such variations as the Collector may permit",

and Form (IV) of Schedule J is the form of sub-lease in this case.

The parties in this case adopted (as they were bound to do) the form in the Schedule, and in obedience to that form they appeared before the Warden and litigated the question of cancellation. I think this is quite different from attempting to give jurisdiction by consent. They are forced into a statutory form which compels them to go to the Warden or the Court when it becomes necessary to apply for cancellation, and in obedience to this, the appellant applied to the Warden for cancellation. I think therefore that the Warden had power to cancel the sub-lease.

On these findings the appellant must succeed, and it becomes unnecessary for me to consider the application of the equitable doctrine of relief against forfeiture to the special circumstances of this case.

I am of opinion that the appeal should be allowed and the order of the Warden cancelling the sub-lease restored. The respondent should pay all costs.

HOWES, J.—This is an appeal from the decision of Mudie J., by which he reversed a decision of the Warden of Mines cancelling a sub-sub-lease between the parties; No. 170/24 of sub-lease 129/22. The ground for cancellation of the sub-sub-lease was a breach of clause 1 thereof. Shortly, the lessees agreed to pay tribute at the rate of 6% on all ore won while 500 or more coolies, or their equivalent in horse-power, were at work; and 8% when less than 500 coolies were employed.

No specific rent was payable under the sub-lease: the reddendum taking the form of the percentage tribute abovementioned.

The lessees paid 6% on the ore won during a period, between 19th October, 1932 and 10th December, 1932, in which they should have paid 8%, and in consequence committed a breach of clause 1. The Warden of Mines held that the breach was proved, and that the sub-lease was liable to cancellation under clause 8 (i) of the sub-lease and section 97 (ii) (a) of the Mining Enactment No. 19 of 1928.

The sub-lease was made on the 14th May, 1924 at which date the Mining Enactment No. 12 of 1911 was in force, and was in the Form IV "Memorandum of sub-lease" set out in Schedule 'J' to that Enactment. Section 29 (i) of the above Enactment required the sub-lease to be "substantially" in the form given in the Schedule "with such variations, if necessary, as the Collector may permit, filled in and duly signed by each of the parties thereto....." In the present sub-lease, the form in Schedule J was followed, and the blanks therein filled in. There was, in addition, a 'variation' viz., in clause 8 (i) the period in which the sub-lessees were given in which to pay the tribute was reduced from the 'six months' provided in the form, to one month from the date at which such payment became due; so that on proof that the respondents had failed to pay the tribute within one month, the sub-lease was "liable to cancellation at any time by the Warden or the Court." This variation was obviously 'permitted' by the Collector and the sub-lease was duly registered.

No indication is given in the 1911 Enactment as to what extent Form IV in the Schedule J may be altered by way of variation, and I see no reason why, if the parties so agree, the six months mentioned in clause 8 (i) should not be varied to one month, without affecting the validity of the sub-lease.

The rights and obligations of the parties in this case arise under a contract voluntarily entered into by them. True, it is a statutory form of contract, but this does not alter the relationship between the parties.

By the Mining Enactment No. 19 of 1928, the Mining Enactment of 1911 was repealed; but by section 2 (ii) of the 1928 Enactment "Nothing in this Enactment shall.....in the absence of an express provision in that behalf abrogate any of the rights or privileges expressly conferred thereby" (i.e. by the repealed Enactment) "provided that every such title, right or privilege shall be limited to the extent prescribed by the Enactment under or by virtue of which the same was granted or conferred." There is a further proviso:—

> "Save as by such title or Enactment is expressly otherwise provided, it shall be incumbent upon a lessee or occupier of the said land to hold and mine the same in accordance with the covenants or conditions set forth in this Enactment, and in all respects as if this title to occupy the same were a lease issued under this Enactment."

Although the wording of section 2 (ii) is somewhat ambiguous, in my view, the result is that the title, rights and privileges of the parties in this case are governed by the 1911 Enactment, by virtue of which the sub-lease was granted. In other words, the express contract between the parties was unaltered by the 1928 Enactment.

In the case of *Yap Foong* v. *Salak South Ltd.*, *Innes* on Land Registration 145, decided in 1911, in which a sub-lessee holding under the Mining Enactment, 1904 (which was similar to that of 1911) had failed to comply with clause 8 (iii) of the sub-lease, which stated that the sub-lease was liable to cancellation at any time by the Warden or the Court upon proof that the sub-lessee has not during a period of six months employed at least 100 coolie-miners for not less than one month in mining the land, the Court of Appeal in an oral judgment held that the words 'liable to cancellation' meant liable at the option of the sub-lessor.

who upon proving to the Warden that a breach had been committed by the sub-lessee, had a right to have the sub-lease immediately cancelled: the Court of Appeal holding that the order of the Warden allowing the Company an extension of 3 months to comply with the terms of the sub-lease was *ultra vires*.

It will be noted that the decision in *Yap Foong* v. *Salak South Ltd.* (*supra*) was based on a breach of covenant other than non-payment of rent. Moreover, the report only contains the substance of the judgment of the Court of Appeal given verbally, and that Court was only concerned with the particular breach mentioned. I do not seek to overrule the decision of the Court of Appeal in that case, which was, doubtless, perfectly correct under the then Enactment.

Presumably, to remedy this hardship, by the 1928 Mining Enactment, section 97 (ii), the Warden was given a discretion as to the cancellation of sub-leases on certain specific breaches of the clauses of the sub-lease, instead of the arbitrary power given by the form of sub-lease, contained in the Schedule to the 1911 Enactment.

This amendment, as I have already stated, in my view, does not apply to the present case. For the purpose of the present case, I hold that the payment of the percentage 'tribute' is the equivalent of rent.

Clearly, under a strict legal interpretation of the present sub-lease, by clause 8, the sub-lease was liable to cancellation. It remains to be seen whether in equity the Court should grant relief.

Counsel for the appellant has argued that the English principles of equity, in general, and in the absence of statutory enactment, have no application in these States. This is a proposition to which I should hesitate to subscribe. To do so, would be setting back the clock. As Sir Henry Maine has pointed out in his "Ancient Law," in progressive societies social necessities and social opinion are always more or less in advance of law, and the three instrumentalities by which the gulf between the two is narrowed are legal fictions, equity and legislation.

I cannot agree that the doctrines of equity are to be side-tracked, pending the passing of Enactment by the legislature. From the earliest times equity has always given relief against a forfeiture where the Court can give compensation for the forfeiture; and especially where the forfeiture in substance was merely security for payment of a monetary sum, as in the present case. Where the forfeiture has been caused by non-payment of rent, the forfeiture was always treated as a mere security for payment, and relievable if the arrears with interest be paid in full.

In the present case, the appellant, so far as I am aware, although he may have risked the cancellation of his sub-lease (in fact, this has not happened) has not been prejudiced in any way. It was not disputed that the respondents were unaware until June, 1933 of the breach of clause 1 by the party to whom they had further sub-let, and as soon as they became aware of the breach, tendered the additional 2% tribute for which they admitted liability under their sub-lease. The amount involved has no bearing on the case. By acceptance of the additional tribute, the appellant can be placed in exactly the same position as he was before the breach.

In my opinion, this is a case in which this Court should in equity grant the respondents relief against the cancellation of the sub-lease (although not on the grounds given by the learned trial Judge), and the appeal should be dismissed and the reversal of the decision of the Warden by the learned Judge be confirmed.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

April 16, 1934.

G. STEPHEN.....Plaintiff.

v.

M. VALLIPURAM.....Defendant.

[NEGRI SEMBILAN CIVIL SUIT No. 58 of 1929]

The Civil Procedure Code, 1918, Chapter XXII—Application for execution—Order for payment of judgment-debt by instalments still in force.

So long as an order for the payment of a judgment-debt by instalments exists, the judgment-creditor cannot proceed to execution by attachment and sale.

F. A. P. Wright for the judgment-creditor

Mervyn Farr for the judgment-debtor.

Cur. Ad. Vul

HOWES, J.—So long as the order for payment by instalments exists, I hold that the judgment-creditor cannot proceed to execution. There was no provision in the Judge's order as to what was to be done in the event of the judgment-debtor making default. The remedy